Original

CAAT A Local 556

90C309, 90C443

IN THE MATTER OF AN ARBITRATION

BETWEEN: GEORGE BROWN COLLEGE OF APPLIED ARTS AND TECHNOLOGY

AND: ONTARIO PUBLIC SERVICE EMPLOYEES UNION

AND IN THE MATTER OF A GRIEVANCE OF J.DESIMONE

BOARD OF ARBITRATION:	Kevin M. Burkett	- Chairman
	R. Hubert	- Employer Nominee
	Larry Robbins	- Union Nominee

APPEARANCES FOR THE EMPLOYER:	Susan McDermott	- Counsel
	Sally Layton	- Director, Human Resources
	Dr. S. A. Holloway	- Dean, School of Technology & Science
	Richard Smith	- Chair of Computer Science and Engineering Technology

APPEARANCES FOR THE UNION:	Malcolm Ruby	- Counsel
	Tom Tomassi	- Chief Steward, Local 556
	John Desimone	- Grievor

A hearing in this matter was held in Toronto on February 15, 1991

A W A R D

1. The grievor, Mr. John Desimone, a teacher at the College, challenges a letter that he received from the College dated April 18, 1990. The letter, which is reproduced below, refers to certain difficulties with his teaching and to certain complaints from students and then goes on to recommend professional development. Mr. Desimone disputes the factual basis upon which the College relied in deciding that he required professional development and characterizes the letter as disciplinary in nature. He seeks the opportunity to refute what he considered to be allegations going to his professional competence. The College, on the other hand, disputes that the letter is disciplinary in nature. The College asserts that it is not disciplinary, that it does not form part of Mr. Desimone's disciplinary record and undertakes that it will not be relied upon in support of disciplinary action in the future. While acknowledging that the letter could be used at some future date as proof that Mr. Desimone was aware that the College had recommended professional development, the College argues that in view of its undertaking, as set out above, it is not disciplinary and, therefore, we are without jurisdiction to hear the matter.

2. The letter to Mr. Desimone reads as follows:

> "This letter will serve to confirm the essential content of our meeting with Sally Layton, Richard Smith and Tom Tomassi on April 9th about your current difficulties with teaching at the College. As you know, my office has received a number of complaints from students in your classes and on occasion we have had to make some scheduling changes to alleviate tense situations. One

of my major tasks as an academic administrator at the College is to provide a suitable learning environment for both students and faculty. In addition, I must make long-range plans regarding the programmes which must be run and the provision of qualified faculty to teach those programmes. In our discussion, I indicated to you that I would like you to consider both short and long term plans to meet both sets of concerns.

In view of the difficulties expressed by students with your teaching style and given the changing nature of the types of students entering the college system, we would like you to consider pursuing some professional development activity relating to the effective teaching of the adult learner. We believe that this could lead to a more rewarding teaching experience for you and your students. In the long term, there are indications that machine shop training will undergo a phase-out at the College. I am therefore encouraging all faculty based in that area to extend their skills into other fields so that we will not be faced with redundancies or other emergency situations in the future. The College is prepared to assist all faculty in this regard but the choice of training is left up to the individual concerned. I strongly urge you to consider some professional development in these two areas because I believe that it could lead to a very positive outcome both for you and for the College. Please let me know when you come to a decision on this."

3. The Union maintains that the complaints against Mr. Desimone are factually inaccurate, constitute a mark against him, have already been relied upon by the College and may be relied upon in the future to his detriment. The Union argues, therefore, that the letter constitutes discipline to which Mr. Desimone is entitled to respond by way of a grievance. The Union argues that there can be no doubt in this regard in the context of professional employment where one's professional reputation is paramount. The Union relies upon City of Toronto and C.U.P.E. Local 79 (1984) 16 LAC (3d) 384 (Picher); and Metro Transit Commission of Halifax and Amalgamated Transit Commission of Halifax and Amalgamated Transit Union (1985) 20 LAC (3d) 204

(Darby). The College, relying on its undertakings, argues that the matter is not disciplinary and, therefore, we are without jurisdiction. Reference is made to the following awards: Re Union Gas Ltd. and Oil, Chemical & Atomic Workers' International Union (1978) 21 LAC (2d) 439 (Hinnegan); Re Brown Brothers Ltd. and Graphic Arts International Union, Local 28B (1973) 2 LAC (2d) 349 (Weatherill); Re Seneca College of Applied Arts & Technology and Ontario Public Service Employees Union (1978) 17 LAC (2d) 117 (Brown); Re United Automobile Workers, Local 112 and De Havilland Aircraft of Canada Ltd. (1971) LAC Vol. 22 160 (Weatherill).

4. We have reviewed the authorities and considered the submissions of counsel and have concluded that the letter in question is not disciplinary and, therefore, cannot be grieved. A general statement of the jurisprudence is found at pages 468-9 of Brown and Beatty, Canadian Labour Arbitration (2d) as follows:

> "...a written warning, which forms part of the grievor's employment record, which is intended to induce her to alter her behaviour and which may have a prejudicial effect on her position in future grievance proceedings, will likely be regarded as being disciplinary in nature. Conversely, where the written warning forms no part of the employee's record for the purpose of determining the severity of future discipline, or where it does not involve a change in status or a monetary loss, or where the warning merely indicates what disciplinary action might be taken in future, arbitrators have ruled that such notations are not disciplinary in nature. "

The following statement, which reflects the above summary, is found in Mount Sinai Hospital and Nurses' Association (1976) 13 LAC (2d) 103 at page 106:

"It appears to be established in the cases that the mere fact that an employer may make critical assessments of an employee's work performance does not necessarily, without more, require a characterization of that action as the imposition of discipline. In this regard Re Corp. of County of Norfolk and London and District Building Service Workers' Union, Local 220 (1972), 1 L.A.C. (2d) 108 (Palmer) is instructive. In that case the employer had carried out an annual review wherein its employees were assessed and informed of the assessment by the employer. Moreover, corrective suggestions, if needed, were made. The union sought to have this assessment treated the same way as written reprimands. A majority of the board of arbitration concluded as follows:

'Not all forms of disapproval shown by an employer constitute "discipline" for the purposes of adjudication by arbitration. Although a complete definition of what constitutes "discipline" may be difficult to achieve, it is manifest that one element is that the action claimed to be "discipline" must form part of the concerned employee's record.' "

Finally, if there is any doubt that letters containing negative comments respecting an employee's performance that do not become part of the employee's disciplinary record and, therefore, do not stand to prejudice an employee are not disciplinary that doubt is dispelled in re City of Toronto and C.U.P.E. Local 79 (supra); an award relied upon by the Union. Speaking directly to the question of evaluation letters Arbitrator Picher stated:

"Common sense dictates, however, that there should be some latitude in an employer to make negative comments respecting an employee's performance without necessarily incurring the risk of a grievance with the full panoply of procedures that might ensue. To that end, arbitrators have recognized that adverse performance notations, even if they are directed to correcting or improving an employee's performance, are not necessarily to be construed as disciplinary in the sense that they may be the subject of arbitration. In this regard, arbitrators have noted that there can be no prejudice to an employee when a negative evaluation or notation does not become part of the employee's "record" for any purpose relating to his or her employment status. The general view is that

> whenever an evaluation or notation becomes part of an employee's record, in the sense that the employer might rely on it in future to justify a change in status or to implement a decision involving monetary loss to an employee, it must be viewed as disciplinary; Re Mount Sinai Hospital and Nurses' Assoc. of Mount Sinai Hospital (1976), 13 L.A.C. (2d) 103 (Brandt) at pp. 105-6; Re County of Norfolk and London & District Building Service Workers' Union, Local 220 (1972), 1 L.A.C. (2d) 108 (Palmer); Re Workers' Compensation Board of British Columbia and Workers' Compensation Board Employees Union (1982), 7 L.A.C. (3d) 92 (Ladner). "

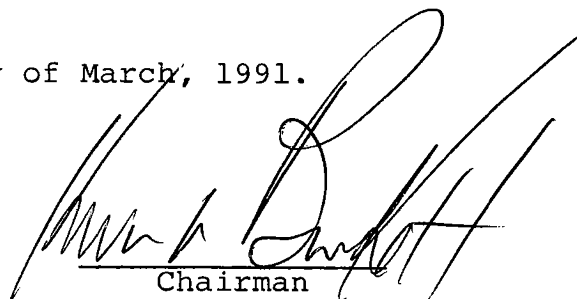
(See also the other awards relied upon by the College.)

5. Against this backdrop the characterization and undertakings of the College are critical. The College, within whose power it is to discipline, has stated for the record that it is not a disciplinary letter and has undertaken that it will not form part of Mr. Desimone's disciplinary record nor be relied upon in the future to support a more severe disciplinary penalty than would otherwise be justified. Indeed, in our view, having decided not to discipline, the College could not at some future date rely on the allegations against Mr. Desimone and attempt to prove them. This letter can only be used as proof that Mr. Desimone was aware that it was the College's view that he should pursue some professional development. Applying the case law to the circumstances before us it must be found that this letter is not disciplinary and, therefore, cannot form the subject matter of a grievance.

6. Having made this finding we are without jurisdiction

to hear the matter or to make any order.

DATED at Toronto the 18th day of March, 1991.



Chairman

I concur "R. Hubert"
Employer Nominee

I concur "Larry Robbins"
Union Nominee